ECONOMISTS INCORPORATED

BRUCE M. OWEN
PETER R. GREENHALGH
WILLIAM C. MYSLINSKI
STEPHEN E. SIWEK
JOSEPH W. McANNENY
BARRY C. HARRIS
JOHN H. PRESTON
KENT W. MIKKELSEN
WILLIAM P. HALL
MICHAEL G. BAUMANN
PHILIP B. NELSON
BRUCE R. SNAPP
DAVID D. SMITH
ROBERT D. STONER
MARK W. FRANKENA
PAUL E. GODEK
H.W. FURCHTGOTT-ROTH
HENRY B. McFARLAND
GALE MOSTELLER
JEFFREY W. SMITH
GLORIA J. HURDLE

DEAN FURBUSH
DAVID A. ARGUE
JONATHAN WALKER
SUSAN E. DUDLEY
DAN ALGER
JOHN R. MORRIS
I. CURTIS JERNIGAN, JR.
MARGARET E. GUERIN-CALVERT

DIRECTORS
ROBERT W. CRANDALL
PETER R. GREENHALGH
GEORGE A. HAY
WILLIAM C. MYSLINSKI
ROGER G. NOLL
BRUCE M. OWEN
A. MICHAEL SPENCE

SPECIAL CONSULTANTS
ROBERT W. HAHN
JOHN E. CALFEE
SHARON M. OSTER

MAY 26, 1995

SUITE 600
1233 20TH STREET, N.W.
WASHINGTON, D.C. 20036

(202) 223-4700
TELECOPIER: 202-296-7138

BRUCE M. OWEN
DIRECT LINE
(202) 833-5224
INTERNET: OWEN.B@EI.COM

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 26 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington DC 20554

Re: Review of the Prime Time Access Rule, Section 73.658 (k) of the Commission's Rules (MM Docket No. 94-123)

Dear Mr. Caton:

Enclosed for filing in the record of the above proceeding are 10 copies of a study entitled "Prime Time Access Rule: A Supplementary Economic Analysis," which Economists Incorporated has prepared on behalf of Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc.

Sincerely,

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:

Review of the Prime Time Access Rule, Section 73.658 (k) of the Commission's Rules	}	MM Docket No. 94-123

PRIME TIME ACCESS RULE:

A SUPPLEMENTARY ECONOMIC ANALYSIS

May 26, 1995

ECONOMISTS INCORPORATED
WASHINGTON, D.C.

CONTENTS

FIGURES

APPENDIX TABLES

I. INTRODUCTION AND SUMMARY

> "The prime-time access rule . . . works against viewers' interests."
>
> Bruce M. Owen and Steven S. Wildman
> VIDEO ECONOMICS (1992) 180.

As explained in Economists Incorporated's initial economic report in this proceeding, the Prime Time Access Rule (PTAR) reduces the economic welfare of television viewers while providing no palpable benefit to any economic or diversity interest of the Commission. These reply comments address certain economic arguments advanced by those who would retain the Rule, particularly James A. Clifton, Raymond S. Hartman and Steven S. Wildman of The Law and Economics Consulting Group, Inc. (LECG), writing on behalf of the Association of Independent Television Stations (INTV), King World Productions and Viacom,[1] and Oliver E. Williamson and Glenn A. Woroch, writing on behalf of the Coalition to Enhance Diversity.[2]

The most extensive economic arguments are put forth by LECG, and these are addressed first. Williamson and Woroch examine the relationship between "hierarchy" and diversity; this subject is addressed at the end of these reply comments.

---

1 James A. Clifton, Raymond S. Hartman and Stephen S. Wildman, *The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market*, The Law and Economics Consulting Group, Inc., March 7, 1995, MM Docket No. 94–123 [hereinafter LECG].

2 Oliver E. Williamson & Glenn A. Woroch, *A Comparative Efficiency Analysis of the Prime Time Access Rule*, March 7, 1995, MM Docket No. 94–123.

Examination of LECG's analysis leads to the following conclusions: .

- LECG has provided no credible economic argument supporting the necessity to subsidize independent stations at the expense of UHF or other affiliates, or first-run programming at the expense of network programming. There simply is no reason to suppose that market outcomes in this case are inferior to government-influenced outcomes.

- There is no credible economic evidence that PTAR has had any material effect on the growth of independent stations. Other factors, such as the growth of cable and the expansion of advertising demand, are far more plausible explanations for this growth. Even if one accepts LECG's deeply flawed econometric model, that model implies that to date PTAR has *reduced* the number of independents and predicts that PTAR will not increase the number of independents by one per market until 40 years after PTAR was adopted, in the year 2010.

- LECG argues that PTAR has increased the prime-time ratings of independent stations. This conclusion relies on two extremely unlikely assumptions: (1) that the Fox network has had no effect on the ratings of its affiliates and (2) that the carry-over effect of higher ratings for independent stations in the access period can leap-frog the first half hour of prime time (where it has no effect) and increase ratings in the second half hour.

- LECG attempts to show that the repeal of PTAR would result in precipitous ratings decreases for independent stations. In addition to defying common sense, this analysis is unsound because many "independent" stations are now affiliated with one of the three new broadcast networks. There is no evidence that PTAR was ever responsible for a significant ratings increase for independent stations outside the access period, and whatever rating increase did occur has diminished over time.

- LECG is incorrect in its implicit assumption that there is an economic basis for a subsidy to UHF broadcast stations. A UHF handicap is not a market failure. To the extent that a technical UHF handicap exists, it is analogous to the position of a farmer located somewhat farther from the local market than competing farmers. Economic efficiency is not advanced by subsidizing such distant farmers at the expense of close-in farmers.

- LECG's analysis of the UHF handicap focuses on inappropriate financial data. Station financial results are affected by many factors, such as increased competition, that have nothing to do with the UHF handicap. LECG has confused the effects of additional station competition and competition from cable networks with the effects of signal quality. LECG provides no sound basis for believing in the existence of a UHF handicap.

- The LECG data on profitability show that UHF independents were more profitable in 1992 than UHF affiliates of ABC, CBS and NBC. In 1993, UHF profits continued to improve. As a group, UHF independents had greater profits and cash flow in 1993 than UHF affiliates of ABC, CBS and NBC. This is true whether or not Fox affiliates are categorized as "independent."

- LECG points out that television programs are public goods. From this observation, LECG apparently intends the inference that a subsidy to first-run syndicated programs is required. No such inference can be drawn. First, *all* television programs are public goods; there is nothing special about first-run syndicated programs. Second, even if a subsidy were warranted, it makes no sense to raise the subsidy by taxing another category of programming that has the same public good characteristic.

- LECG argues that first-run syndicated programming has an inherent handicap relative to off-network programming so that it fares, or would fare, poorly despite its "higher popularity." LECG associates this

handicap with the fact that off-network programs recover much of their production costs from one of the networks. But the real "handicap" of first-run series is that they are produced at lower cost, with lower production values and with less promotional expenditure than network series destined for off-network exhibition. Nothing about this "handicap" constitutes a market failure, or prevents first-run series from competing with off-network series on a price-per-rating-point basis. Certainly nothing about the "handicap" requires corrective government intervention.

- LECG claims that ABC, CBS and NBC dominate viewing and advertising markets. Even if this were true, PTAR would be an inappropriate response. But LECG's evidence is sorely lacking in credibility. Prime-time viewing is *less* concentrated among program sources than access-period viewing. The networks compete, according to Owen and (LECG co-author) Wildman, in an advertising market that includes national spot, cable networks and other national media. Their shares are relatively small, and this market is unconcentrated. Increased prices for network advertising in the late 1980s are attributable to cyclical shifts in demand, not to lack of competition.

- LECG contends that PTAR fostered the growth of local programming and local spot television advertising. While the number of independent stations broadcasting local news programs has increased since the Rule's adoption, the percentage of independent stations broadcasting local news programs has decreased. Moreover, most of the stations that have added local news programming did so after the emergence of the Fox network and are Fox affiliates. LECG presents no evidence that the Rule stimulated local programming on ABC, CBS or NBC affiliates during the access period, one of the Rule's original objectives. LECG's analysis of local spot television advertising ignores general economic trends and their effect on advertising. The growth in local television advertising that LECG attributes to the Rule occurred several years after the Rule at a time of rapid advertising growth in all media.

Williamson and Woroch support repeal of that part of the Prime Time Access Rule that deals with off-network syndication, a conclusion with which we concur. Their paper is misguided, however, in supporting retention of the restriction on network programming in the access period in the top-50 markets.

- Williamson and Woroch maintain that the intent of the off-network restriction of PTAR was to promote entry of independent programmers and stations. They argue correctly that whatever basis there may been for this "infant industry" protection in 1971, it certainly has now expired. The off-network restriction currently serves only to redistribute profits from ABC, CBS and NBC affiliates and prime-time suppliers to independent stations and first-run syndicated program suppliers and thus should be removed.

- Williamson and Woroch claim that diversity will be enhanced if relationships between networks and affiliates are "non-hierarchical." They supply no theoretical or empirical analysis supporting their claim that diversity would be enhanced by less "hierarchical" relationships, much less any basis for the claim that such diversity would have benefits outweighing its economic costs.

II. Impact of the Rule on Independent Stations

A primary theme of LECG's analysis is to demonstrate that PTAR had a favorable impact on independent stations, whether measured in terms of the number of independents, their ratings or their financial viability. The Rule so blatantly favors independent stations, it should be no surprise that to the extent it created any noticeable effect, the effect would be favorable to such stations. From this LECG mistakenly infers that removal of the Rule would toll the demise of independent stations. Another glaring omission in LECG's analysis regarding independent stations is a coherent economic rationale as to why the Rule is (or was) needed. The reason LECG fails to provide an economic basis for the Rule is that the Rule does not address any failures of the competitive market. The Rule does nothing more than introduce a distortion in the market that favors one set of broadcast stations at the expense of another.

A. The Rule creates a bias against affiliates in favor of independents

One *ex post* rationale that has come to be applied to PTAR is that it provides independent stations with a competitive advantage over competing ABC, CBS and NBC affiliates by placing a constraint on the programming options available to affiliates during the access period. As the Federal Trade Commission staff notes in its Comments in this proceeding, this rationale is at odds with an original objective of the Rule, namely to free affiliates from network control so that affiliates could offer programming that better reflects local viewer preferences.[3] Thus, realization of this objective of the Rule would have made affiliate stations *more* popular by better matching programming with viewers' preferences, and hence in-

---

3 *Comments of the Staff of the Bureau of Economics of the Federal Trade Commission*, March 7, 1995, MM Docket No. 92–123 at 23 [hereinafter *FTC Comments*].

creased any competitive advantage affiliates had vis-à-vis independent stations. Current advocates of the Rule want a device that favors independents (including Fox, UPN and Warner Brothers Network affiliates) at the expense of ABC, CBS and NBC affiliates rather than a policy intended to promote viewers' interests.

LECG's and INTV's argument that PTAR helped independent stations by handicapping ABC, CBS and NBC affiliates indicates tacit acceptance of the proposition that the first-run programming offered by affiliates during the access period is of lower quality and has less viewer appeal than the network programming it replaced.

By reducing the attractiveness of programming offered by ABC, CBS and NBC affiliates, the Rule may have increased independent stations' ratings and may have induced a few marginal independent stations to enter the market, even though such entry would not have occurred had program quality on affiliates remained at pre-PTAR levels. As the FTC notes, "[f]rom a competition policy perspective, this entry would not necessarily be viewed as evidence of desirable market performance—the opposite may be true."[4] Neither LECG nor INTV provides a credible rationale for why it is now or ever was desirable to promote entry that otherwise would not occur in a competitive market. Both commentaries take the position that some independent stations could not survive in a competitive market and need to be subsidized. LECG never identifies a market failure, however, that warrants government intervention on behalf of independent stations in general or even for the "handicapped" UHF stations.[5] Nor does LECG explain why it is desirable for the government to force competitors to subsidize these unprofitable enterprises. Further, LECG fails to explain why the subsidy should come from only one type of competitor—ABC, CBS and NBC affiliate stations—when independents face competition from cable networks and other independent stations as well as from these affiliate stations.

---

4 *Id.* at 30, footnote omitted.

5 *See* Section III *infra.*

B. Growth of independents

LECG claims that one of the chief benefits of PTAR is that it had a positive impact on the number of independent stations after a 5 to 15-year lag, even though there was no immediate effect. The econometric model on which LECG bases this claim, however, is incapable of determining whether it was PTAR or some other factor that was responsible for the growth in the number of independent stations. The LECG model does not account for certain factors that likely contributed to growth in the number of independent stations, such as increased cable penetration and increased demand for advertising. The LECG model does not even include data for 1980–86, the time period when most of the growth in the number of independent stations occurred. Moreover, even if one were to accept LECG's model, the implication of that model is that PTAR will not cause an increase in the number of independent stations until after the year 2002!

In order to analyze the impact of PTAR on the number of independent stations, LECG counted the number of independent stations in thirty ADIs for the years 1965–76, 1979, 1987 and 1993. Averaged across the thirty markets, there was no growth in the number of independent stations from 1965 through 1979. Only in 1987 and 1993 did the average number of independent stations increase. LECG attempts to explain the number of independent stations in each market over time as a function of the number of television households in the market, average per capita income per market and UHF penetration in the market. In addition, LECG includes three variables supposedly intended to measure the impact of PTAR. The first is a dummy variable that has the value 0 prior to 1971 and the value 1 from 1971 onward. The second, labeled T71, is a trend variable that has the value 0 prior to 1971, the value 1 in 1971, the value 2 in 1972, and so on, having the value 23 in 1993. The third variable is simply the second one (T71) squared.

The first or dummy variable is supposed to capture the short-run, immediate impact of PTAR on the number of independent stations. This vari-

able is not statistically significant—in other words, according to LECG's model, there was no short-run impact of PTAR on the number of independent stations. LECG argues that the two trend variables (T71 and T71 squared) measure the long-run impacts of PTAR. Trend variables, however, only indicate whether something is increasing or decreasing over time, not the *cause* of the increase or decrease. Therefore, LECG has shown that there was an upward trend in the number of independent stations starting sometime after the Rule (a fact that no one disputes), but not that the Rule *caused* the increase in the number of independent stations. LECG asserts that PTAR is the cause of this trend because the trend variable starts in 1971. However, given the growth pattern of independent stations in LECG's data, a trend variable starting in any year prior to and including 1979 would show a positive trend. Hence, simply choosing 1971 as the starting date of the trend is not sufficient to attribute this trend to PTAR.

Accepting for purposes of argument that the trend variables in LECG's model do measure the long-run impact of PTAR on the number of independent stations, Figure 1 shows PTAR's estimated impact based on LECG's linear model.[6] The immediate impact of PTAR, as estimated by the LECG model, was to decrease the number of independent stations. LECG states that PTAR had a positive effect after about 15 years, or around 1985. LECG has misinterpreted its own model. The positive effect to which LECG refers is that by 1985 PTAR was causing no *further decline* in the number of stations. In fact, from 1971–85 the PTAR effect *reduced* the average number of independent stations per market by 0.8 stations. It is not until after about 32 years, or in 2002, that LECG's model predicts a positive effect of PTAR on the number of independent stations. *Only after*

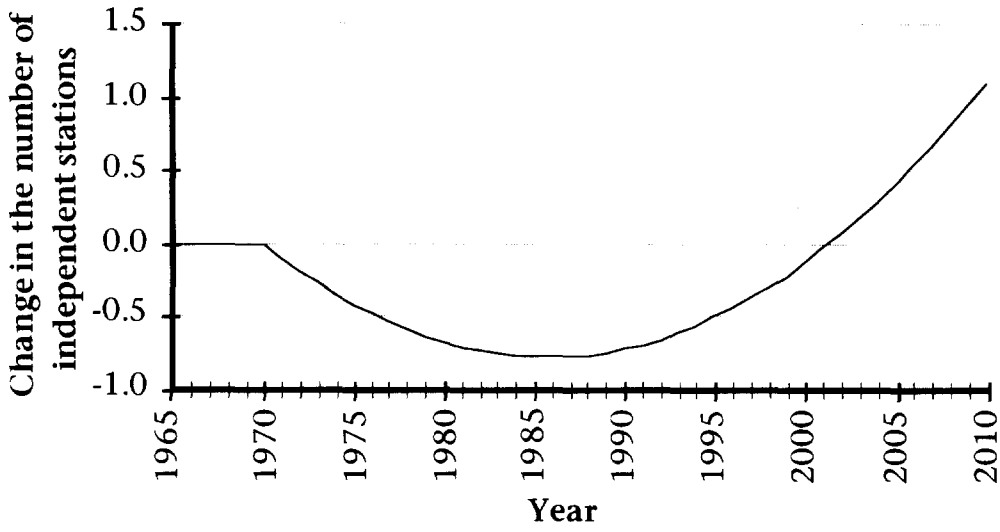
---

6 LECG, *supra* note 1, at Appendix D. Under the linear specification, LECG estimates the long-run impact to be given by

$$-0.1\ T71 + 0.00319\ T71^2$$

where T71 is the trend variable that measures the number of years since PTAR was in effect, with 1971 counting as 1.

Figure 1 **Number of independent stations per market attributable to PTAR, according to LECG model[7]**



approximately 40 years, or in 2010, does LECG's model predict that PTAR will have increased the number of independent stations by one per market.

Not only does LECG include meaningless variables in its model, it also fails to include some important ones such as cable penetration and demand for advertising. LECG's justification for omitting cable penetration is inadequate and there is no explanation for leaving out advertising. Both of these variables are likely to have influenced the entry of independent stations.

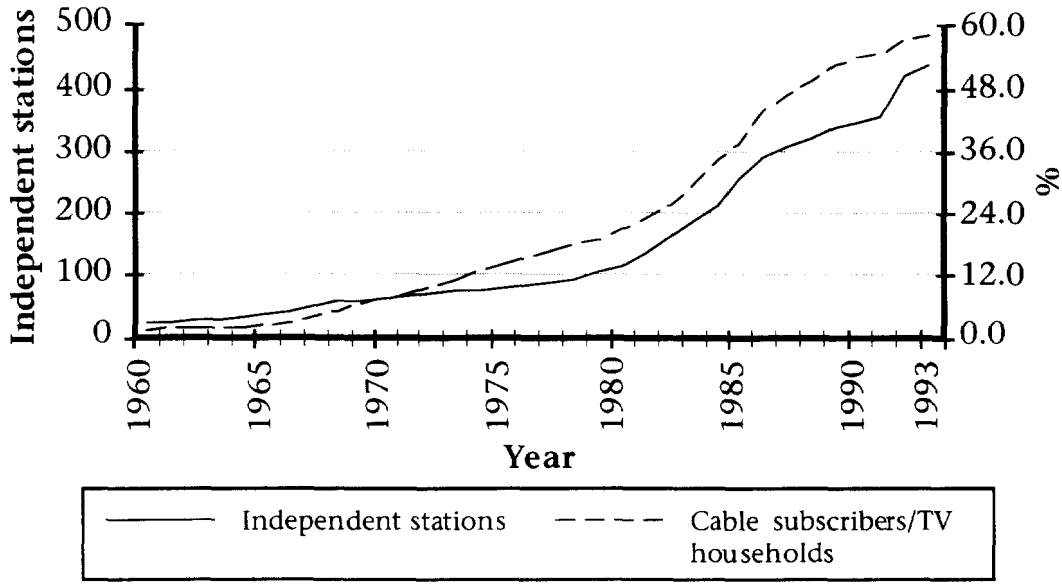
As LECG observes, the growth of cable television has reduced considerably the UHF signal disadvantage because cable-distributed UHF signals are equal in reception quality to cable-distributed VHF signals.[8] Figure 2 shows the number of independent stations and cable penetration from 1960 through 1993. It is clear that the growth in the number of independent stations tracks closely the growth in cable penetration.

---

7 Based on LECG's linear regression results as reported in LECG, *supra* note 1, Appendix D, Table D.3, at 47.

8 *Id.* at 40.

Figure 2 Cable penetration and independent TV stations[9]



Owen and (LECG co-author) Wildman note that the increase in the number of independent stations is a consequence of the growth of cable and domestic communications satellites.[10] Crandall also attributes the growth in independent stations to the growth in cable subscribers.[11] In its comments, the FTC staff examined the factors contributing to broadcast station growth and concluded that "[i]t has been the growth of cable, more than any other factor, that has facilitated the entry of new commercial television stations, and the formation of new advertiser-supported broadcast television networks..."[12] This finding is consistent with the view expressed by FCC analysts Setzer and Levy.[13]

---

9 Source: Appendix A, Table A–1.

10 BRUCE M. OWEN AND STEVEN S. WILDMAN, VIDEO ECONOMICS 180 (1992).

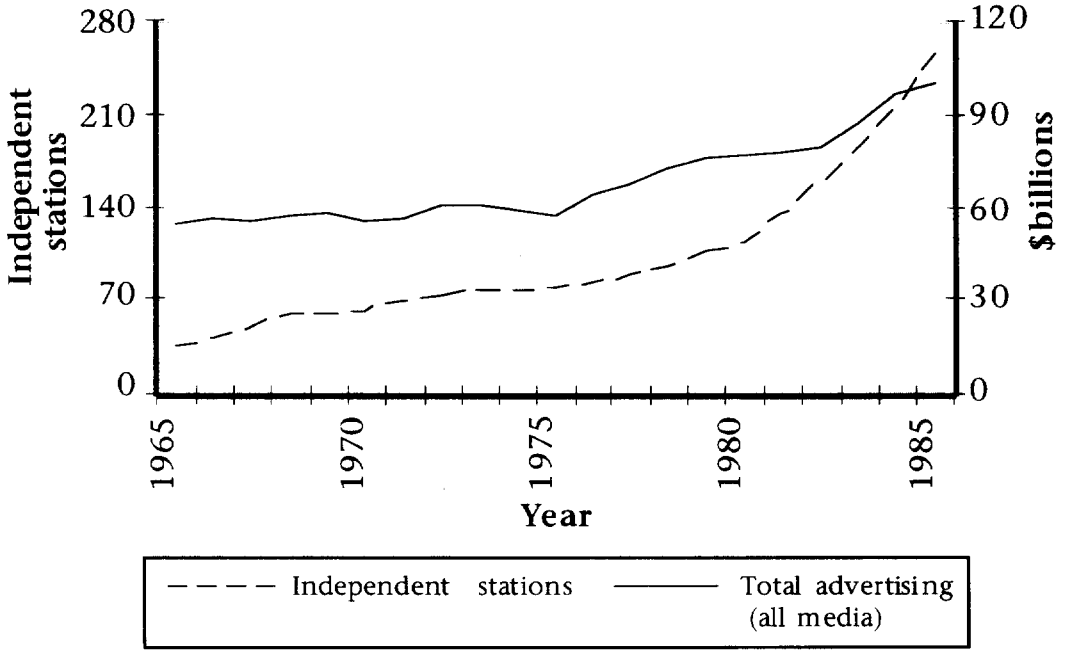
11 Robert W. Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules*, June 14, 1990, MM Docket No. 90–162, at 38.

12 *FTC Comments*, *supra* note 3, at 32.

13 *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, June 1991, at 17–18.

As discussed below and shown in Figure 3, the growth of advertising sales increased sharply in the mid-1970s. Television advertising in real dollars increased by 48 percent in 1975–80; radio advertising increased by 28 percent; newspaper advertising increased by 27 percent. The rapid growth in the number of independent stations did not occur until the early 1980s.

Figure 3: Independent stations and total advertising in real dollars (all media)[14]



These facts suggest that growth in advertising may also have contributed to the growth in the number of independent stations. Frazier, Gross & Kadlec argue that rapidly expanding television advertising demand throughout the United States was the driving force behind the growth in the number of television stations overall and of the number of independent television stations in particular. Their report notes that "[i]n 1970 there were few markets outside of the top 10 with sufficient revenues to

14 Source: Appendix A, Table A–2.

support a fourth station."[15] In 1976, however, television station advertising revenues jumped 30 percent. This enabled many markets to support a fourth commercial television station, and stimulated the rapid growth of independent stations.[16]

LECG admits that its model does not account for the effect of increased cable penetration on the number of independent stations.[17] Moreover, LECG has not attempted to account for the effect of increased advertising demand on the growth of independent stations. In fact, LECG states that it cannot even tell when the growth of independents occurred because it lacks data for 1980–86, the period during which the number of independent stations in LECG's sample markets increased most rapidly. Amazingly, LECG did not collect data for the time period that contained the phenomenon that it sought to explain.

In sum, LECG's analysis of the factors that affected the growth of independent stations is seriously flawed. Consequently, its conclusion that the growth in the number of independent stations is attributable to PTAR is unsupported. The primary basis for LECG's conclusion is an econometric model that identifies the growth of independent stations, but cannot distinguish its cause. The model does not include data for the time period during which most of the growth of independent stations occurred. It does not account for factors such as increased cable penetration and expanded advertising demand that are likely to have influenced the growth in the number of independent stations. Even if LECG's model is assumed to be properly specified, its prediction of no station growth for thirty years after PTAR is at odds with LECG's own conclusions.

LECG also used a "logit" specification to examine the effect of PTAR on the number of independent stations. LECG claims that this specification measures the proportional growth in the number of independent

---

15 Frazier, Gross & Kadlec, Inc., *Independent Thinking: An Overview of the Independent Television Industry,* Jan. 1986, at 2–1.

16 *Id.* at iii–iv.

17 LECG, *supra* note 1, Appendix D, at 46.

stations. Specifically, if the number of independent stations in market m at period t is $N_{m,t}$, then the proportion in place in year t is $P_{m,t} = N_{m,t}/N_{m,93}$, where $N_{m,93}$ is the number of stations in the market in 1993. The dependent variable in the regression is the natural logarithm of the ratio of the proportion of stations in the market in year t ($P_{m,t}$) to the proportion of stations remaining to enter the market by 1993 ($1-P_{m,t}$). For example, if a market had 4 stations in 1993 and 3 in 1987, then the dependent variable would have the value ln(3) for that market in 1987.

LECG's logit model suffers from all the infirmities described above in connection with its linear model, and more besides. For example, many observations were excluded from the analysis. The model's specification forces LECG to *exclude* from the analysis those markets that did not experience any growth in the number of independent stations and those markets that saw a decrease in the number of independent stations. This is because the logarithms of zero and of negative numbers, for example, are not defined. Hence, LECG only includes observations for those markets in those years that had an increase in the number of independent stations, and observations only for years when the number of independent stations in a market was less than the number in that market in 1993. This model specification includes 84 fewer observations than were included in the linear specification.

In addition, LECG's logit specification only makes sense if the number of independent stations is expected to reach some upper limit or "saturation point." LECG defines the saturation point in terms of the actual number of stations in each market in 1993, rather than the technical/regulatory limit on the number of stations in each market. Treating the number of independent stations in a market in 1993 as the saturation point does not make sense. First, the number in 1993 itself is something the model should explain. Second, the model unrealistically forces all markets to reach the saturation point in the same year. Third, the model falsely assumes that there can be no further growth in the number of independent stations after 1993.

The LECG logit model, like its linear model discussed above, implausibly implies that PTAR had a negative effect at first on the number of independent stations. However, the time required for PTAR to have a positive effect in the logit model differs from the linear model by a factor of three. These inconsistent results cast further doubt on the validity of both models.

C. Impact on ratings of independents

LECG's analysis of the impact of PTAR on independent stations' ratings suffers from many of the same flaws as its analysis of PTAR's effect on the growth of independent stations. LECG claims to have corrected for all the major structural changes in the broadcast market that have occurred since PTAR was implemented. Nevertheless, its analysis does not hold constant at least one very important factor, the emergence of the Fox network. LECG notes that Fox affiliates thrived in the competitive environment of the 1980s.[18] LECG's data indicate that Fox affiliates' ratings are higher than the ratings of non-Fox independent stations, indicating that the presence of Fox and the economies realized through its network efficiencies has some impact on ratings. Contrary to its claim,[19] LECG did not account for the presence of Fox in its econometric analysis. Hence, its econometric model erroneously attributes Fox-induced growth in ratings to a long-run PTAR effect.

LECG considers both short-run and long-run effects of PTAR, and looks at both the access period, 7:30–8:00 p.m., and the two half hours immediately following the access period. LECG concludes that PTAR increased independent station ratings both in the short run and in the long run for both the access period and the two subsequent half hours. A closer examination of the evidence presented, however, reveals that PTAR had only a short-run effect during the access period. Moreover, as LECG notes, the

---

18 *Id.*, Appendix D, at 42.

19 *Id.* at 45.

initial impact of PTAR on independent station ratings has diminished over time.

1. Short-term effects

The data presented by LECG are consistent with the claim that PTAR had an immediate effect of increasing the ratings of independent stations during the access period.[20] This result is not surprising given that the Rule prohibited affiliate stations from broadcasting network programming. While the originators of the Rule may have envisioned high-quality, locally-produced public affairs shows and independently-produced programs that ABC, CBS and NBC did not previously broadcast, the commercial reality is that most stations chose low-cost, low-quality syndicated shows to fill the access slots.[21] Faced with this lower-quality programming, some viewers chose to watch it, some viewers chose to switch to the programming on independent stations, and the rest chose to switch off their television sets.

Accepting, for current purposes, LECG's estimate that PTAR was responsible for a 2.8 rating-point increase for independent stations during the access period, the impact of PTAR was to cause approximately one million households that were denied network programming during the access period to switch to lower-quality programming on independent stations.[22] At the same time, approximately another million households turned off their television sets in response to the Rule.[23] Viewers who

---

20 *See id*, Table V.1, at 89.

21 *See* HARRY CASTLEMAN AND WALTER PODRAZIK, WATCHING TV: FOUR DECADES OF AMERICAN TELEVISION 230 (1982).

22 *See*, LECG, *supra* note 1, at 52. LECG's analysis on the impact of PTAR is restricted to the top 30 markets since, according to LECG, when PTAR was first implemented there were almost no independent stations below the top 30 markets. Hence, the phenomenon of viewers switching from ABC, CBS and NBC affiliates to independent stations is concentrated in the top 30 markets. Based on data reported in the 1972–73 TELEVISION FACTBOOK 47–a, in 1971 the top 30 markets contained 35,099,400 television households. Hence, 2.8 rating points represents 982,783 television households.

23 *See* Economists Incorporated, *An Economic Analysis of the Prime Time Access Rule*, March 7, 1995, MM Docket No. 94–123, at 37–38 [hereinafter EI].

continued to watch programming on ABC, CBS and NBC affiliate stations received less-than-network-quality programming, and, as explained below, viewers of prime-time programming likely suffered a reduction in program quality. An enormous price in lost surplus, estimated at $8.5 billion, has been paid by viewers since 1971 to achieve those initial 2.8 rating points for one half hour.[24]

The LECG evidence provides little support for a short-run effect of PTAR on the two carry-over periods, 8:00–8:30 p.m. and 8:30–9:00 p.m. In discussing the data presented in its Table V.1 that show a decline in average ratings during the first carry-over period, LECG notes that "[t]he ratings in carry-over period 1 were not different statistically in the short-run post-PTAR years than they were in the pre-PTAR years."[25] Even when LECG corrected for other effects using econometric methods, the carry-over effect during 8:00–8:30 p.m. was not statistically significant.[26]

Despite finding no carry-over effect of PTAR from the access period to the first half-hour period immediately following the access period, LECG reports that there was a carry-over effect to the *second* subsequent half hour. LECG does not explain the implication of this finding. The finding amounts to a claim that, after causing a gain of one million households during 7:30–8:00 p.m. but then losing all of those households during 8:00–8:30 p.m., the Rule was somehow responsible for bringing almost 240,000 households back to independent stations at 8:30 p.m. This claim defies common sense and suggests that the model itself is unsound.

Finally, in Tables V.1, D.2 and D.4, LECG attempts to demonstrate a carry-over effect by reporting that PTAR had a statistically significant impact on all three time periods taken together. However, this analysis demonstrates nothing about a carry-over effect. Statistically, the impact during the three periods taken together can be explained entirely by the

---

24 *Id.* at 41.

25 LECG, *supra* note 1, at 89 n.51.

26 *Id.* at 90 n.52.

impact during the access period. The combined results are consistent with the hypothesis that all of the impact occurred during the access period.

2. Long-term effects

In addition to whatever short-term impact PTAR may have had on independent station ratings, LECG argues that there are also long-term effects. LECG makes this claim despite being unable to report any evidence of long-term effects during the access period. In discussing its Tables V.1 and D.2, LECG notes that in the long run the increase in access period ratings is not statistically significant.[27] After correcting for other factors, LECG still does not find a long-run effect using its own measurement criteria.[28] The data presented in LECG's Tables D.1 and D.2 indicate that for non-Fox independents, average ratings during the access period are lower in the long run (1987–93) than they were in the pre-PTAR period.

LECG argues that the carry-over effect on ratings between 8–9 p.m. is stronger in the long run than in the short run. Based on the data in Tables D.1 and D.2, however, all of the alleged carry-over effect is attributable to increased ratings on Fox affiliates. LECG's data indicate that ratings on Fox affiliates are higher in the carry-over period than in the access period. Carry-over period ratings for non-Fox independents, however, are lower than during the access period and lower than they were before PTAR within the context of LECG's method. This evidence indicates that PTAR has had no long-run effect either in the access period or in the carry-over periods. Rather, any long-run increase in ratings is attributable to Fox.[29]

---

27 *Id.* at 90.

28 LECG's econometric analysis tests for long-run effects by including trend variables. The use of a trend variable does not indicate that any observed trend was caused by PTAR. Even if one were to accept LECG's approach, however, their results in Table D.4 indicate no long-run effect from PTAR on access period ratings.

29 PTAR did not indirectly cause the ratings increase by facilitating the emergence of the Fox network. As was discussed above, the growth in the number of independent stations, a prerequisite for Fox's emergence, was not caused by the Rule. In addition, LECG provides no credible evidence that there is a positive ratings carry-over effect for independent stations from the access period to the

Because LECG did not control for the presence of the Fox network in its econometric analysis, any finding of a long-run PTAR effect using that analysis is also questionable. The trend variable LECG uses to look for a long-run effect simply indicates that ratings increased in the carry-over periods during 1987–93, but does not indicate that PTAR was the cause of this increase. Given the statistically very different performance of Fox affiliates and non-Fox independents, it is likely that all of the measured trend effect is due to the presence of Fox network programming.

3. Impact of repeal

LECG claims that repeal of PTAR will harm independent stations and emerging networks. This claim is based on the faulty LECG econometric analysis of the effect of PTAR on ratings of independent stations during the access period and carry-over periods. The evidence presented in Tables V.1, D.1 and D.2, however, indicates that during 1987–93 there was no effect of PTAR on independent station ratings during the access period or carry-over periods. Any increased ratings during 8–9 p.m. in the 1987–93 period relative to the pre-PTAR period are limited to Fox affiliates and are more likely the result of Fox network programming than PTAR. These data therefore imply that the repeal of PTAR would have little effect on independent station ratings.

LECG forecasts the impact of the repeal of PTAR on independent station ratings based on an extrapolation of its econometric model. The structure of the model, however, primarily measures the impact of PTAR on independent station ratings immediately following PTAR's imposition. The coefficient of the PTAR dummy variable is determined chiefly by the seven observations during the 1970s. At best, the PTAR dummy averages those seven observations with the two observations in the later period. In addition, in later periods the model makes no attempt to disentangle any remaining PTAR effect on ratings from the emergence of the Fox network,

---

period after 8 p.m. If anything, the existence of PTAR works to prevent Fox from taking full advantage of network efficiencies by programming the full 22 hours of weekly prime time. *See* EI, *supra* note 23, at 32 and 44.

despite the statistical difference between Fox affiliates and non-Fox independents. Thus LECG's extrapolation into the future likely reflects the initial short run, rather than current, effect of PTAR on independent station ratings and is likely to attribute to PTAR ratings increases that are really caused by emerging network programming.

As LECG notes, the impact of PTAR on independent station ratings is likely to have diminished over time, although probably to a greater extent than LECG concedes. LECG admits that in the early years after PTAR, ABC, CBS and NBC affiliates in the top-50 markets had no high-quality programming to substitute for the lost network and off-network programming. Part of the independents' initial ratings increase was due to the lack of good-quality, first-run programming for network affiliates. Logically then, since better first-run programming is now available, the effect of PTAR on independents' ratings should be smaller than it was when PTAR was initiated. Moreover, if PTAR were repealed, any increase in the ratings of ABC, CBS and NBC affiliates would come in part at the expense of cable networks that did not exist in 1971. Further, LECG argues that first-run programming is more popular than off-network programming. Hence, any decrease in independent ratings that may result from repeal of the Rule should be substantially smaller than the ratings increase realized initially. In fact, LECG's current-period data on non-Fox independents indicate that ratings for these stations are no higher than they were before PTAR.[30]

LECG's link of PTAR to emerging networks is based on the alleged carry-over effect from the access period to later time periods. As discussed above, however, LECG's evidence does not support a carry-over effect. In the short run, there was no carry-over to the half hour immediately following the access period, and in the long run there is no carry-over at all for non-Fox independents. The alleged carry-over effect on Fox affiliates primarily reflects the popularity of Fox network programming. It is, and will be, the programming on the new networks that will determine their

---

30 LECG, *supra* note 1, Appendix D, at 38, 40.

survival, not PTAR and any hypothesized carry-over effect from the access period to the remainder of prime time.

D. Summary

It is clear that the Rule favors independent stations by penalizing network affiliates and viewers. LECG provides no reason to believe that this thumb on the scale of competition represents sound economic policy. LECG's econometric analysis that purports to show that PTAR caused an increase in the number of independent stations is fatally flawed because it omits important variables and attributes causation where none actually exists.

The evidence presented by LECG is consistent with PTAR having a positive initial short-run effect on independent station ratings during the access period, but not with an additional long-run effect. Any long-term ratings gain seems to be attributable to Fox network programming. Moreover, there is insufficient evidence to conclude that PTAR had any carry-over effects to the periods immediately following the access period. LECG finds no carry-over effect to the first half hour in the short run, and any effects in the long run appear to be limited to Fox affiliates. For non-Fox independents, there is clearly no carry-over effect—ratings decline after the access period and are lower than they were before PTAR. LECG acknowledges that its estimates of carry-over effects are inexact, stating that "[c]onsiderably more work would have to be done...in order to better isolate the pure PTAR effect."[31] Despite LECG's finding of a statistical difference between the performance of Fox affiliates and non-Fox independents, LECG did not take this factor into account when testing for the effects of PTAR. In short, LECG has offered no credible evidence that repeal of the Rule is likely to have a significant impact on the ratings of independent stations or the growth of emerging networks.

---

31 *Id.* at 91 n.54.